

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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J.P., a minor, by and through  
CHANNY SOK-HANG as guardian,

Plaintiff,

v.

CITY OF STOCKTON, STOCKTON  
POLICE DEPARTMENT, ERIC JONES,  
JORGE ANDRADE, BRADLEY MILLER  
and DOE 1 to 10,

Defendants.

No. 2:21-cv-00788 WBS AC

MEMORANDUM & ORDER RE:  
DEFENDANTS' MOTIONS TO  
DISMISS AND TO STRIKE  
PORTIONS OF PLAINTIFF'S THIRD  
AMENDED COMPLAINT AND  
PLAINTIFF'S MOTION TO  
SUBSTITUTE

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Plaintiff J.P., the minor son of the late Saoun Pol, in his individual capacity, and as the real party in interest and the successor-in-interest of Pol, brought this action against defendants arising from the officer-involved shooting and death of Pol. (Third Amend. Compl. "TAC" (Docket No. 31).) Before the court are defendants' motion to dismiss (Docket No. 32) and motion to strike (Docket No. 33), and plaintiff's motion to substitute (Docket No. 39).

I. Factual and Procedural Background

The factual background of this case is described in detail in the court's November 30, 2021 Order (Docket No. 25) granting in part and denying in part defendants' motion to dismiss plaintiff's First Amended Complaint (Docket No. 16). In short, plaintiff alleges that on May 4, 2019 defendants Stockton Police Department Officers Jorge Andrade and Bradley Miller responded to 911 reports of a man, later determined to be Pol, "acting erratically." (TAC 3-4, ¶¶ 17-22.)<sup>1</sup> Upon arrival at the scene, after giving brief instructions to Pol, Andrade fired gunshots at Pol, resulting in his death. (Id. ¶¶ 22-23.)

After the court's November 30, 2021 order on defendants' motion to dismiss, plaintiff filed a Second Amended Complaint (Docket No. 28), after which the parties stipulated to plaintiff filing the TAC. (Docket Nos. 29, 30.) In his TAC, plaintiff, in relevant part, has (1) added a claim for liability under City of Canton v. Harris, 489 U.S. 378 (1989), against the City of Stockton ("the City") and the Stockton Police Department ("the Police Department"); (2) again brought a claim under the Tom Bane Act, though only against Andrade; and (3) again brought a negligence claim, though only against Andrade and Miller.

II. Motion to Dismiss and Motion to Strike Claims

Defendants move to dismiss (1) plaintiff's claim for Canton liability; (2) plaintiff's Tom Bane Act claim; and (3) plaintiff's negligence claim, or in the alternate, plaintiff's

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<sup>1</sup> The numbering of paragraphs in the TAC begins anew for each claim for relief and in the prayer for relief. To avoid confusion, citations to the TAC will include page numbers and paragraph citations.

1 negligence claim against Miller. Defendants also move to strike  
2 the same claims.

3 A. Canton Liability

4 When the court gave plaintiff leave to amend his  
5 complaint in its previous order, the court stated that leave was  
6 granted "if he can do so consistent with this Order." (Order on  
7 Mot. to Dismiss at 12.) The court did not give plaintiff leave  
8 to amend in order to add a new claim not previously asserted, nor  
9 did plaintiff request such leave to amend. For this reason,  
10 plaintiff's claim for Canton liability will be stricken. See  
11 Gerritsen v. Warner Bros. Ent., Inc., 116 F. Supp. 3d 1104, 1125  
12 (C.D. Cal. June 12, 2015) (striking newly pled claims because  
13 they exceeded the scope of leave to amend granted by the court);  
14 DeLeon v. Wells Fargo Bank, N.A., No. 10-cv-01390-LHK, 2010 WL  
15 4285006, at \*3 (N.D. Cal. Oct. 22, 2010) ("[W]here leave to amend  
16 is given to cure deficiencies in certain specific claims, courts  
17 have agreed that new claims alleged for the first time in the  
18 amended pleading should be dismissed or stricken.").

19 B. Tom Bane Act & Negligence

20 In its previous order, the court dismissed plaintiff's  
21 Tom Bane Act and negligence claims because (1) defendants argued  
22 they were barred due to plaintiff's failure to timely present a  
23 claim pursuant to the California's Government Claims Act,  
24 California Government Code § 911.2, and (2) plaintiff did not  
25 oppose dismissal. However, plaintiff has re-alleged these claims  
26 solely against Andrade and Miller in the TAC.

27 Even against these individual officers, the claims are  
28 barred. If a claim against an entity is barred due to failure to

1 comply with the claim presentation requirements of the California  
2 Government Claims Act, the claim is also barred against a "public  
3 employee or former public employee for injury resulting from an  
4 act or omission in the scope of his employment as a public  
5 employee." See Cal. Gov't Code § 950.2.

6 Plaintiff does not dispute that his claim was untimely  
7 but argues that defendants have not "stipulated that both  
8 officers' actions were wholly under color of law" and believes it  
9 is "probable" that the City and the Police Department would argue  
10 the officers were not acting under color of law. (Pl.'s Opp'n at  
11 4-5.) Plaintiff argues that for this reason his allegations  
12 under the Tom Bane Act in the TAC state that Andrade is liable  
13 "whether or not acting under color of law." (TAC 26, ¶¶ 4-6)

14 However, the concept of "under color of law" is  
15 different from "scope of employment." See Smithen v. United  
16 States, No. CV 09-00414-GW, 2017 WL 11628588, \*8, n. 2 (C.D. Cal.  
17 July 28, 2017). Therefore, plaintiff's allegations regarding  
18 "color of law" do not defeat the time barred nature of the state  
19 law claims. Notably, plaintiff's TAC states that Andrade and  
20 Miller were "at all times material herein, . . . law enforcement  
21 officer[s] employed by the City [] and [] Police Department,  
22 acting within the scope of that employment." (TAC 2-3, ¶¶ 9-10  
23 (emphasis added).)

24 Accordingly, the court will dismiss plaintiff's Tom  
25 Bane Act and negligence claims because the claims are barred due  
26 to failure to timely present a claim pursuant to the California  
27 Government Claims Act.

28 III. Motion to Strike Prayer for Relief

1 Defendants move to strike paragraph 4 of plaintiff's  
2 TAC, which seeks an injunction against all defendants. (TAC 28,  
3 ¶ 4.) First, defendants argue, and plaintiff does not dispute,  
4 the requested injunctive relief cannot be permitted against Eric  
5 Jones as he retired and is no longer the Stockton Chief of  
6 Police.<sup>2</sup> (See Defs.' Mot. to Dismiss at 9; Pl.'s Opp'n at 5.)<sup>3</sup>  
7 To the extent the injunction is requested against Eric Jones, it  
8 is stricken.

9 Next, defendants argue that paragraph 4(a) requests an  
10 injunction against "defendants and their sheriff's deputies," but  
11 the TAC does not name any sheriff's department or deputies as  
12 parties. Plaintiff provides no argument in opposition to this  
13 portion of the motion. No sheriff's department or sheriff's  
14 deputies are involved in this suit, and therefore, the court will  
15 grant defendants' motion to strike the language in paragraph 4(a)  
16 regarding sheriff's deputies.

17 Finally, defendants argue the requested injunction is  
18 improper as to Andrade and Miller as they are "rank and file  
19 officers who have no ability to institute or enforce any  
20 policies." (Defs.' Mot. to Strike at 10.) Plaintiff provides no  
21 argument in his opposition to this portion of the motion to  
22 strike. (See Pl.'s Opp'n at 5.) When asked at oral argument if  
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24 <sup>2</sup> Alongside their motions, defendants submitted a request  
25 for judicial notice of a news article from a local media outlet  
26 announcing Eric Jones' retirement. (Docket No. 34). Plaintiff  
27 does not oppose this request (Pl.'s Mot. at 2), and therefore,  
28 the request is GRANTED.

<sup>3</sup> Plaintiff's motion to substitute relates to this issue  
and is discussed below.

1 and how plaintiff has standing to seek injunctive relief against  
2 these officers, plaintiff's counsel could provide no intelligible  
3 response. This lawsuit is brought only by the minor son of the  
4 decedent. There are no allegations that these defendants pose a  
5 particular threat to the constitutional rights of this plaintiff  
6 which needs to be enjoined. See City of Los Angeles v. Lyons,  
7 461 U.S. 95, 106 (1983) (holding that plaintiff must show "a real  
8 and immediate threat" of facing the same conduct he had  
9 previously experienced by police officers to have standing for  
10 injunctive relief). Therefore, defendants' motion to strike the  
11 references to Andrade and Miller from paragraph 4 is granted.

12 IV. Plaintiff's Motion to Substitute

13           Given Eric Jones' retirement as Stockton Chief of  
14 Police, plaintiff moves to substitute the Interim Stockton Chief  
15 of Police in his new official capacity for "Eric Jones in his  
16 official capacity." (Pl.'s Mot. at 1.) The parties agreed at  
17 oral argument that Stanley McFadden has now been appointed as the  
18 new Stockton Chief of Police, so there is no longer an interim  
19 Chief of Police.

20           Plaintiff relies on Federal Rule of Civil Procedure  
21 25(d), which allows an officer's successor to be substituted when  
22 the original "public officer who is a party in an official  
23 capacity . . . ceases to hold office while the action is  
24 pending." Fed. R. Civ. P. 25(d) (emphasis added). Defendants  
25 correctly argue that Rule 25(d) only allows for substitution when  
26 the public officer is sued in his official capacity. Plaintiff  
27 states in his motion to substitute that Jones is named "in both  
28 his official and individual capacity," but the TAC does not

1 explicitly state as such. (See TAC 2, ¶ 8.)

2           However, the "basis of the claims asserted and the  
3 nature of the relief sought make clear" that the action is also  
4 brought against Jones in his official capacity. See Cent. Rsrv.  
5 Life of North Am. Ins. Co. v. Struve, 852 F.2d 1158, 1161 (9th  
6 Cir. 1988) (relying on the basis of the claims and nature of the  
7 relief sought, rather than the caption of the complaint, in  
8 determining if the state was the real party in interest); Price  
9 v. Alaska, 928 F. 2d 824, 828 (9th Cir. 1990) (relying on the  
10 basis of the claims asserted and the nature of the relief sought,  
11 specifically damages, the court held that the defendants were  
12 being sued in their individual capacity). Here, plaintiff  
13 alleges that Jones was the final policymaking authority for the  
14 Police Department and plaintiff is seeking injunctive relief  
15 against Jones to implement certain policies in the Police  
16 Department, which he can only do in his official capacity. (TAC  
17 6, ¶ 36; 28, ¶ 4.) The basis of plaintiff's claims and the  
18 injunctive relief sought indicate that Jones is also sued in his  
19 official capacity.

20           Therefore, plaintiff's motion to substitute will be  
21 granted and Stanley McFadden will be substituted in place of Eric  
22 Jones.

23           IT IS THEREFORE ORDERED that:

24           1. Defendants' motion to dismiss (Docket No. 32)  
25 plaintiff's Tom Bane Act and negligence claims be, and the same  
26 hereby, is GRANTED.

27           2. Defendants' motion to strike (Docket No. 33)  
28 plaintiff's Canton liability claim, and prayer for relief to the


1 extent it names Eric Jones, "sheriff's deputies," and Andrade and  
2 Miller be, and the same hereby, is GRANTED.

3 3. Plaintiff's motion to substitute (Docket No. 39)  
4 Eric Jones with the new Stockton Chief of Police Stanley McFadden  
5 be, and the same hereby, is GRANTED.

6 Plaintiff has twenty days from the date of this Order  
7 to file a fourth amended complaint, if he can do so consistent  
8 with this Order.<sup>4</sup> Plaintiff is not given leave to allege  
9 additional claims or re-allege the claims for Canton liability,  
10 the Tom Bane Act, and negligence dismissed or stricken above  
11 against any defendants.

12 Defendants have thirty days, from the end of  
13 plaintiff's twenty-day deadline to file an amended complaint, to  
14 respond to the operative complaint at that time.

15 Dated: May 4, 2022

  
16 WILLIAM B. SHUBB  
17 UNITED STATES DISTRICT JUDGE  
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28 <sup>4</sup> Any amended complaint should not restart numbering for  
paragraphs for each claim.